92-1940

No. 93-_____

Supreme Court, U.S.
FILED
JUN 2 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANTHONY S. MONTELEONE &
MARY ANN CUMMINS-MONTELEONE

Petitioners,

No. 91-16804
No. 91-16725
9th Cir Ct.
of Appeals

v.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SOLANO NORTHERN
SOLANO JUDICIAL DISTRICT,
et al.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

ANTHONY S. MONTELEONE
MARY ANN CUMMINS-MONTELEONE
P.O. Box 1703
Travis Air Force Base, California 94535
Tele. (707) 425-5385

Petitioners, in their proper persons.

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioners' appeal from The United States District Court of California, Eastern District, denying their request for release from custody and reversal of their convictions become moot after their release from custody; or, would the fact that collateral consequences attached to their convictions warrant a determination on the merits of their appeal, thus preserving a live case or controversy?

2. Did the Court of Appeals abuse its discretion in dismissing the Appeal as moot without requesting or allowing the parties to address the issue of "mootness?"1/

1/ The style of this case as shown on the front cover of this Petition contains the name of all parties to this cause. This case initially included Albert M. Cardoza, Sheriff of Solano County as a party. However, since their release from incarceration petitioners can no longer seek relief from their confinement by Sheriff Cardoza. The Circuit Court of Appeals consolidated petitioners' appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT . . . 8

IN CUSTODY JURISDICTION 10

THE COLLATERAL CONSEQUENCES OF MONTELEONES' CONVICTIONS GIVES THE COURT OF APPEALS JURISDICTION TO HEAR THE MERITS OF MONTELEONES' APPEALS 12

LIVE CASE OR CONTROVERSY 22

THE COURT PANEL ABUSED ITS DISCRETION BY NOT INQUIRING OF THE PARTIES SUPPLEMENTAL BRIEFING ON THE ISSUE OF MOOTNESS PRIOR TO DISMISSING THE APPEAL . . . 25

CONCLUSION 29

TABLE OF AUTHORITIES

Byrnes v. United States,
408 F.2d 599 (9th Cir. 1969) 15

Carafas v. LaVallee,
391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct.
1556 (1968) 7,
10

Chavez v. United States,
447 F.2d 1373 (9th Cir., 1971) . . . 15

Church of Scientology of California v.
United States and Frank S. Zolin,
____ U.S. ____, ____ L.Ed. 2d ____,
____ S.Ct. _____ (1992) 24

Cox v. McCarthy,
829 F.2d 800 (9th Cir. 1987) 7,
11,
16,
26

Dremann v. Francis,
828 F.2d 6 (9th Cir. 1987) 17,
18,
19

Hirabayashi v. United States,
828 F.2d 591 (9th Cir. 1987) 14,
15

Lane v. Williams,
455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct.
1322 (1982) 8,
11,
13,
17,
28

Lane v. Williams,
594 F.2d 614 (7th Cir. 1979) 8, 28

McNabb v. United States,
318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 29

Naylor v. Sup. Ct. of State of Arizona,
558 F.2d 1363 (1977) 27

North Carolina v. Rice,
404 U.S. 244, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971) 22

Peyton v. Rowe,
391 U.S. 54 (1968) 16

Pollard v. United States,
352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 16

Preiser v. Newkirk,
422 U.S. 395, 45 L.Ed. 2d 272, 95 S.Ct. 2330 (1975) 22, 28

Robbins v. Christianson,
904 F.2d 492 (9th Cir. 1990) 12, 13, 15

Sibron v. New York,
392 U.S. 40 (1968) 7, 10

United States v. Aluminum Co. of America,
148 F.2d 416 (CA2 1945) 23

United States v. Maldonado,
735 F.2d 809 (5th Cir. 1984) 14

United States v. Michaud,
901 F.2d 5 (1st Cir. 1990) 17, 20

United States v. Morgan,
346 U.S. 502, 98 L.Ed. 248, 74 S.Ct.
247 (1954) 13

United States v. W.T. Grant Co.,
345 U.S. 629, 97 L.Ed. 1303, 73 S.Ct.
894 23

United States v. Walgren,
885 F.2d 1417 (9th Cir. 1989) . . . 15

Walker v. Wainwright,
390 U.S. 335, 19 L.Ed. 2d 1215, 88 S.Ct.
962 (1968) 11

Zal v. Steppe, 92 C.D.O.S. 5877 . . . 13

STATUTES

California Penal Code Section 17(b)(4). 4

California Revenue and Taxation Code,
Section 19401 4

Title 28, U.S. Code, Section 2253 . . 3

Title 28, U.S. Code, Section 2254 . . 3

Title 28, U.S. Code, Section 1254(1) . 2

MISCELLANEOUS AUTHORITIES

Federal SF Form 171 15

Federal Rules of Appellate Procedure,
Rule 22(b) 3

United States Constitution, Article III 2, 22

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Anthony S. Monteleone and Mary Ann Cummins-Monteleone (herein Monteleones), hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.2/

OPINIONS BELOW

The Court of Appeals' decision dismissing the Monteleones' appeals as moot for lack of "in custody jurisdiction" from the United States District Court denying their Petition for a Writ of Habeas Corpus was entered on December 8, 1992, and was not a published decision; See Monteleone v. Municipal Court of California; County of Solano Northern Solano Judicial District,

2/ Petitioners' cases were consolidated by the Court of Appeals.

et al., _____ F. 2nd _____ (9th Cir. Nos. 91-16725, 91-16804). Petition for rehearing was timely filed, but was denied March 4, 1993. The unpublished opinion of the Court of Appeals appears in Appendix A of this Petition. The Final Order of the United States District Court for the Eastern District of California appears in Appendix B of this Petition.

JURISDICTION

The opinion and judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Ninth Circuit on December 8, 1992. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, U.S. Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

Article III, Section 2, states in pertinent part:

> The judicial power shall extend to all Cases, . . . [and] Controversies . . . .

STATUTES

Title 28, U. S. Code Section 2254 states in pertinent part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . .

Title 28, U.S. Code Section 2253 states in pertinent part that:

> In a habeas corpus proceeding before a circuit or district court judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

The Federal Rules of Appellate Procedure, Rule 22(b) states in pertinent part that:

> If an appeal is taken by the applicant, the district judge who rendered the judgment shall . . . issue a certificate of probable cause . . .

STATEMENT OF THE CASE

On September 20, 1989 Monteleones were convicted of three counts of allegedly violating California Revenue and Taxation Code, Section 19401, failing to file a tax return, a misdemeanor, and an additional three counts of allegedly violating Revenue and Taxation Code Section 19406, willful failure to file a tax return with the intent to evade payment of a tax, a felony prosecuted as a misdemeanor by virtue of California Penal Code Section 17(b)(4).

Subsequently, the Monteleones were sentenced, and on October 27, 1990, after exhaustion of state appellate remedies, they were incarcerated. On November 21, 1990 both petitioners filed a Petition for a Writ of Habeas Corpus with the United States District Court, Eastern District of California. On October 15, 1991 the United States District Court denied and dismissed

the Appellants' respective Petitions.

On October 24, 1991 Appellants filed timely notices of appeal; and, on November 4, 1991 the District Court, Honorable Lawrence K. Karlton, granted a certificate of probable cause on Monteleones' appeals.

Anthony S. Monteleone was released from custody on October 17, 1991; and, Mary Ann Cummins-Monteleone was released from custody on November 26, 1991. All the briefs on appeal to Circuit Court of Appeals were timely filed. The briefs by all the parties addressed only the merits of the appeal. In the relief requested on appeal, the Monteleones were seeking reversal of their illegal conviction, inter alia.

On December 8, 1992, a three judge panel consisting of the Honorable Mary M. Schroeder, Honorable Betty M. Fletcher and the Honorable John T. Noonan dismissed

Monteleones' appeal on the grounds that they were moot since the Monteleones were no longer in custody and did not demonstrate they faced future custody -- therefore the Court had no jurisdiction to consider the appeals.

The issue of mootness was raised by the court panel, and not by the parties to the appeals. The Court did not request that any party brief the Court as to whether or why, the appeals had gone moot.3/

On request for rehearing, Monteleones argued that in-custody jurisdiction had been satisfied as they were in custody when the Petition for a Writ of Habeas Corpus

---

3/ The Monteleones are not seeking review of the merits of their appeal. Rather they are seeking only to determine whether the Circuit Court of Appeals had statutory and constitutional jurisdiction to consider the appeal from the habeas corpus proceedings in the district court. The judicial review is about process and jurisdiction.

was filed with the United States District Court. Carafas v. LaVallee, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968); Sibron v. New York, 392 U.S. 40 (1968); Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987).

Monteleones also argued that the only questions which the Appeals Court could consider when deciding if the appeal was moot, were: (i) did sufficient adverse collateral consequences attach to their convictions, which would establish live case or controversy jurisdiction for appellate review, and; (ii) were the Monteleones seeking relief, other than release from their illegal confinement, which the Court could grant, such as reversal of an illegally obtained conviction, thereby not mooting the appeal. Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987)

Finally, Monteleones contended that the Court of Appeals should have not summarily dismissed their appeals as being moot, without first presenting this question to parties for briefing thereon. Lane v. Williams, 455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct. 1322, (1982); Lane v. Williams, 594 F.2d 614 (7th Cir. 1979); Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987).

REASONS FOR GRANTING THE WRIT

The Court of Appeals For the Ninth Circuit summarily dismissed Monteleones' appeals on the grounds that since they were not currently incarcerated, and did not face future incarceration, that their appeals had become moot, as there was no in-custody jurisdiction. However, Monteleones had established in-custody jurisdiction because they were incarcerated on the date which their Petitions For a Writ of Habeas Corpus were filed in the

United States District Court. Thus, the only remaining question before the Court of Appeals was whether or not a live case or controversy existed on which the Court could grant actual relief. The element which serves to determine whether a live case or controversy exists, is whether sufficient adverse collateral consequences attached to Monteleones' convictions, to warrant consideration of the merits of the appeal, and reversal of the conviction.

Monteleones were not simply seeking release from custody. They were also seeking reversal of their illegally obtained convictions. It is the practice not only of the Circuit Courts of Appeals, but as well, the practice of this Honorable Court, to seek supplemental briefing from the parties to a habeas corpus appeal, when the question of mootness is raised by the Court, sua sponte.

Because the panel for the Court of Appeals departed from well settled decisional law when determining whether a habeas corpus appeal has become moot, as well as departing from the accepted procedure of requesting additional briefing from the parties before declaring an appeal to be moot, this petition should be granted.

IN CUSTODY JURISDICTION

For an appellate court to have jurisdiction to hear an appeal from a denial of a Petition for a Writ of Habeas Corpus, the petitioner must be in custody when the petition is filed in the district court. Jurisdiction is not defeated by the unconditional release of the petitioner prior to the completion of the proceedings. Carafas v. LaVallee, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968); Sibron v. New York, 392 U.S. 40 (1968). Therefore,

the appeals court is not deprived of jurisdiction to hear the appeal by way of lack of in-custody jurisdiction. Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987)

Habeas Corpus relief contemplates remedies other than solely release from custody. Reversal of a conviction is that type of relief. Walker v. Wainwright, 390 U.S. 335 19 L.Ed. 2d 1215, 88 S.Ct. 962 (1968); cf. Lane v. Williams, 455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct. 1322, (1982) and its progenies which hold that failure to attack the conviction and the adverse collateral consequences or the underlying conduct of parole violation is fatal to the granting of habeas relief. Additionally, the imposition of fines or penalties only, without an attachment of present or future incarceration is insufficient to invoke habeas relief; and threat of imprisonment for failure to pay a fine does not convey

subject matter jurisdiction for habeas relief. However, under certain circumstances there is an exception to this tenet.

The only question which remains once a petitioner is released from custody, is, "does he have a sufficient stake in his conviction, due to the adverse collateral consequences thereof, which would give the court jurisdiction to entertain and pass on the merits of the appeal?"

THE COLLATERAL CONSEQUENCES OF MONTELEONES' CONVICTIONS GIVES THE COURT OF APPEALS JURISDICTION TO HEAR THE MERITS OF MONTELEONES' APPEALS

Monteleones, throughout these entire proceedings have been classified by the government as "illegal tax protesters." Given today's climate about paying one's "fair share" of taxes, to lessen the burden on all others, the charges leveled against Monteleones and the convictions thereof, are no small matter. Robbins v.

Christianson, 904 F.2d 492 (9th Cir. 1990).

Moreover, Monteleones were charged with felony offenses, prosecuted as misdemeanors. The illegal convictions on these charges carry the additional stigma of tax evasion, as opposed to just simple failure to file a tax return; even though the conviction only made misdemeanants of the Monteleones, rather than felons. Nevertheless, the adverse collateral consequences which attach to this conviction will follow the Monteleones forever, and therefore the appeal was not moot. United States v. Morgan, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247, (1954); Zal v. Steppe, 92 C.D.O.S. 5877; Robbins v. Christianson, supra.

Adverse collateral consequences can be either statutory or non-statutory in nature. Lane v. Williams, supra. For example, the conviction can be used for

sentence enhancement purposes, both on the state and federal level. It could be used to impeach persons credibility as witnesses in other cases, whether it be other future prosecutions, or where they may testify in someone else's behalf in a case. United States v. Maldonado, 735 F.2d 809 (5th Cir. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). The convictions could also serve to act as a bail enhancement tool if the Monteleones are charged by the state or federal authorities, with similar or unrelated charges.

Particularly in the case of Mary Ann Cummins-Monteleone her conviction has been used to terminate her from her job as air traffic assistant with the FAA, as well as keeping her from being re-instated. Many state, federal, local and private employment forms require disclosure by the

applicant of any convictions or sentences served by the applicant. (For example see Federal SF Form 171). And, it has been held that to deny someone unemployment because of past convictions is not discrimination. Therefore, the Monteleones have no remedy available to them to challenge this type of adverse collateral consequence of the conviction, if their appeal is deemed moot simply because they are not in custody and do not face future custody. Robbins v. Christianson, supra.

The collateral consequences of a conviction are presumed to exist, notwithstanding the fact that the conviction is one for a misdemeanor offense. Hirabayashi v. United States, supra; Chavez v. United States, 447 F.2d 1373 (9th Cir., 1971); Byrnes v. United States, 408 F.2d 599 (9th Cir. 1969); United States v. Walgren, 885 F.2d

1417 (9th Cir. 1989). The sooner the issues are litigated, the better, rather than require a citizen to suffer the possibility of adverse collateral consequences for an indefinite period of time. Peyton v. Rowe, 391 U.S. 54 (1968); Pollard v. United States, 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481.

In Cox v. McCarthy, supra, the Ninth Circuit Court of Appeals distinguished between statutory jurisdiction to hear a habeas petition and constitutional jurisdiction, i.e., live case or controversy. The Court found that release from custody did not prevent statutory jurisdiction; and, that a challenge to the convictions, as opposed to only the sentence, preserves the live case or controversy jurisdiction, if adverse collateral consequences attach to the conviction. On appeal the Monteleones were

challenging the conviction, as well as the legality of their sentence and incarceration. In fact, the first prayer for relief requested from the Court of Appeals was to reverse their convictions. This was sufficient to overcome the mootness issue.4/

While the Court of Appeals no longer possessed the power to release the Monteleones from their illegal confinement, it did possess the power to reverse their illegal convictions, removing the adverse collateral consequences attached thereto.

The Court panel which considered Monteleones' appeals relied on Dremann v. Francis, 828 F.2d 6 (9th Cir. 1987) (per curiam) and United States v. Michaud, 901 F.2d 5, (1st Cir. 1990) (per curiam) in holding that the Court had lost jurisdiction. However, neither of those

4/ Id. 829 F.2d at 803; Lane v. Williams, supra, 455 U.S. at 631, fn. 11.

cases are dispositive of the Monteleones' appeals, nor do they even remotely address in-custody jurisdiction, as set forth in the panel's decision.

Nonetheless, the panel did note that the only remaining consequence of the conviction, was payment of a $60,000 fine -- although they gave no consideration to other adverse collateral consequences which attached to the convictions. Monteleones will distinguish those two cases, upon which the panel relied.

In Dremann v. Francis, supra the case involved an attorney who had been held in contempt. The sentence imposed was wholly monetary in nature with no sentence of imprisonment attaching to the original sentence. Upon a hearing, it was found that the attorney "willfully" refused to pay the fine, and was thus given the opportunity to pay, or spend three days in

jail.

The Ninth Circuit Court of Appeals held that the potential of incarceration which attached to the willful failure to pay did not constitute a deprivation of liberty, no conditions of restraint were placed on the petitioner as a result of the sentence, and lastly, the petitioner had control over whether he went to jail or not, as he could pay the fine, or spend his time in jail. It is noted that the petitioner did not allege he could not pay the fine. He merely refused to pay.

If it was the panel's opinion, in the Monteleones' appeals, that no jail sentence attached to Monteleones' initial sentence, they seriously mis-interpreted the facts. In any event, Dremman v. Francis, supra does not address any adverse collateral consequences Monteleones face as a result of their convictions. Simply, the facts of

the Dremman court are not apposite with the facts in Monteleones' habeas corpus proceedings and appeals. Therefore, the principals of law expressed therein are not applicable to the Monteleones' appeals.

The panel next relied upon United States v. Michaud, supra. This case, while more on point to Monteleones' appeals, is still lacking in merit for purposes of dismissing the appeals, as moot. In Michaud, there is a major distinguishable factor, with, apparently a remedy which may still have been available, which may have provided Michaud with relief.

The major factor which is distinguishable in this case is that Michaud could not, and did not establish in-custody jurisdiction when he filed his petition with the district court. This holding was dispositive of the entire case.

Of course, this is completely contrary to the Monteleones' appeals as they were, as a matter of law and fact, in custody when they filed their petition in the district court.

In any event, both cases turned on two facts; whether there was in-custody jurisdiction at the time of the filing of the original petition, and whether a monetary fine, without the attachment of present or future in-custody jurisdiction, was sufficient to invoke habeas jurisdiction and review.

What is note-worthy at this point, is the fact, that in its opinion, The Ninth Circuit Court of Appeals did not reverse itself and find that the presumption of adverse collateral consequences does not exist in this circuit any longer. It merely found that adverse collateral consequences, in the form of monetary

penalties, in the absence of in-custody jurisdiction, was insufficient for purposes of habeas review.

LIVE CASE OR CONTROVERSY

A court's jurisdiction is limited under Article III of the United States to live cases or controversies. "[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" Preiser v. Newkirk, 422 U.S. 395, 45 L.Ed. 2d 272, 95 S.Ct. 2330, (1975); North Carolina v. Rice, 404 U.S. 244, 246, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971). In Preiser, this Court had before it the question as to whether a suit seeking declaratory relief for the alleged illegal transfer of Newkirk, a prisoner, was moot since Newkirk, during the pendency of the litigation, had been transferred from a

maximum security institution, back to a medium security institution. In granting the petition for certiorari, this Court instructed briefing to be limited to the question of mootness.5/

It was found that the case was moot since the relief Newkirk was seeking had already been obtained and there was "'no reasonable expectation that the wrong will be repeated.'"6/ The Court also held that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."7/

Monteleones contend that they had a live case or controversy at all stages, including the appellate stage from the

---

5/ 419 U.S. 894, 42 L.Ed. 2d 138, 95 S.Ct. 172 (1974).
6/ United States v. W.T. Grant Co., 345 U.S. 629, 97 L.Ed. 1303, 73 S.Ct. 894; United States v. Aluminum Co. of America, 148 F.2d 416, 448 (CA2 1945); id., at 422 U.S. 402.
7/ id., at 422 U.S. 401, cites omitted.

habeas corpus proceeding, in that they were seeking reversal of their convictions based on an illegally obtained conviction, not mere release from their illegal custody. The Court of Appeals was not being requested to solely render an advisory opinion as to the illegality of Monteleones' imprisonment. Rather, they were being asked to reverse Monteleones' convictions as being illegally obtained. Clearly, this is relief which could have been granted. Church of Scientology of California v. United States and Frank S. Zolin, ____ U.S. ____, ____ L.Ed. 2nd ____, ____ S.Ct. _____, 91-946, (1992).

In Church of Scientology of California v. United States and Frank S. Zolin, this Court reversed the Ninth Circuit, which held that the appeals had become moot since the Internal Revenue Service had already succeeded in enforcing their administrative

summons, reasoning that since a decision from the court could not alter the fact that the records had already been produced no effective relief could be granted. In reversing, this Court held that the records, even though produced could be ordered returned, along with any copies made thereof, if the summons had been improperly issued, concluding that the appeal was therefore, not moot. In short, if any type of relief can be granted which affects the substantive rights of the parties involved, a justiciable controversy exists, and the appeal is not moot.

THE COURT PANEL ABUSED ITS DISCRETION BY NOT INQUIRING OF THE PARTIES SUPPLEMENTAL BRIEFING ON THE ISSUE OF MOOTNESS PRIOR TO DISMISSING THE APPEAL

On its own initiative the Court panel determined that the appeals had gone moot, apparently because of the lack of in-custody jurisdiction. However, as previously briefed, that was an erroneous

standard which did not warrant dismissal. This left the only other ground for dismissal as being Monteleones' failure to attack the conviction and the adverse collateral consequences thereof. In the Ninth Circuit the presumption is enjoyed by Appellants that adverse collateral circumstances always attend a conviction. And, as previously briefed, the Monteleones are seeking reversal of their conviction.

If the Court Panel had any doubt as to whether these appeals had gone moot, the panel should have followed past Court practice and requested briefing from the parties as to the mootness issue -- as none of the parties on appeal, advanced this issue. In Cox v. McCarthy, supra, the Ninth Circuit was entertaining a habeas appeal. Upon review, the question of mootness arose in the Court. However, the Court did not dismiss the appeal, rather it

requested additional briefing from the parties on the issue of mootness. After receipt of the supplemental briefs the Court than, reluctantly found the appeal to be moot.

In Naylor v. Sup. Ct. of State of Arizona, 558 F.2d 1363 (1977), another habeas appeal, the issue of mootness was again raised by the Court, as opposed to the parties. Again, rather than dismissing the appeal, the Court requested that the parties file supplemental briefs addressing the issue of mootness. Upon the submission of the briefs the Court found that because of the absence of any adverse collateral consequences attendant to the conviction there was no live case of controversy, despite the fact that the petition for the writ had been filed while the petitioner was still in custody, satisfying the in-custody jurisdictional requirement.

Thus, it is the accepted practice of the Ninth Circuit Court of Appeals to inquire of the parties on appeal, when the Court raises the issue of mootness. Not only is it the practice of the Ninth Circuit to request supplemental briefing, it is also the accepted practice of other circuits and acknowledged by this Court. See Lane v. Williams, 455 U.S. 624, 71 L.Ed.2d 508, 102 S.Ct. 1322, (1982); Lane v. Williams, 594 F.2d 614 (7th Cir. 1979); Preiser v. Newkirk, 422 U.S. 395, 45 L.Ed. 2d 272, 95 S.Ct. 2330, (1975).

By deciding, without knowing, that the appeal was moot, the Court panel effectively denied Monteleones appellate review of issues which were certified by the district court as meritorious for further review; denying Monteleones due process and equal protection under the laws. This serious departure from proper

standards of criminal law administration requires corrective action. McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals; or, in the alternative, this Court should issue an order to the Ninth Circuit to re-instate Monteleones' appeals for additional briefing on the issue of mootness.

Respectfully Submitted,

Dated: JUNE 1st, 1993

ANTHONY S. MONTELEONE
P.O. Box 1703
Travis Air Force Base, California 94535
Tele. (707) 425-5385

MARY ANN CUMMINS-MONTELEONE
P.O. Box 1703
Travis Air Force Base, California 94535
Tele. (707) 425-5385

APPENDIX A

NOT FOR PUBLICATION

FILED
DEC 8, 1992
CATHY A. CATTERSON,
U.S. CT. OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY ANN CUMMINS MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA.; COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No. 91-16725 D.C. No. CV-90-01448-LKK
ANTHONY S. MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA,; COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No.91-16804* D.C. No. CV-90-01447-LKK MEMORANDUM**

Appeal from the United States District Court for the Eastern District of California Lawrence K. Karlton, District Judge, Presiding

Submitted November 23, 1992***

Before: SCHROEDER, FLETCHER and NOONAN, Circuit Judges.

* We consolidate these cases on our own motion.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Mary Ann Cummins-Monteleone and Anthony S. Monteleone appeal the district court's denial of their 28 U.S.C. Sec. 2254 habeas petitions. they have both been released from custody since the district court denied their petitions, and have only to pay a $60,000 fine to complete their sentences. Because they are not presently in custody and have not demonstrated that they face future custody, this court lacks jurisdiction to consider their appeals. See Rule 2, Rules Governing Section 2254 Cases, 28 - U.S.C. foll. Sec. 2254; Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987)

(per curiam); see also United States v. Michaud, 901 F.2d 5, 7 (1st Cir. 1990) (per curiam). Therefore, we dismiss their appeals as moot.

DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
OCT 15, 1991
CLERK, US DIST. CT., E. DIST. OF CALIFORNIA
BY _____
Wagner, Jack L
DEPUTY CLERK

ANTHONY S. MONTELEONE,

Petitioner,

No. CIV S-90-1447 LKK GGH P

vs.

CLOSED
DATE:OCT 15, 1991

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

ORDER

Petitioner, a state prisoner proceeding, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. The matter was referred to a United States Magistrate Judge prusuant to 28 U.S.C. Sec. 636(b)(1)(B) and Local General Order No. 262.

On August 30, 1991 the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that

any objections to the findings and recommendations were to be filed within thirty (30) days. On September 25, 1991, petitioner filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. Sec. 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed August 30, 1991, are adopted in full; and

2. The petition for habeas corpus is denied.

DATED: October 11, 1991.

Karlton, Lawrence K.
UNITED STATES DISTRICT JUDGE

/ls:ji

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FILED
OCT 15, 1991
CLERK, US DIST. CT., E. DIST. OF CALIFORNIA
BY _____
Wagner, Jack L
DEPUTY CLERK

MARY ANN CUMMINS-MONTELEONE,

Petitioner,

No. CIV S-90-1448 LKK GGH P

vs.

CLOSED
DATE:OCT 15, 1991

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

ORDER

/

Petitioner, a state prisoner proceeding, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. The matter was referred to a United States Magistrate Judge prusuant to 28 U.S.C. Sec. 636(b)(1)(B) and Local General Order No. 262.

On August 29, 1991 the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that

any objections to the findings and recommendations were to be filed within thirty (30) days. On September 25, 1991, petitioner filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. Sec. 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed August 29, 1991, are adopted in full; and

2. The petition for habeas corpus is denied.

DATED: October 11, 1991.

Karlton, Lawrence K.
UNITED STATES DISTRICT JUDGE

/ls:ji